Nebraska Law Review

Volume 74 | Issue 2 Article 6

1995

While the United States Supreme Court Waves Goodbye to the After-Acquired Evidence Doctrine, It May Allow the Employer to Hold a Card Up Its Sleeve in *McKennon v. Nashville Publishing Co.*, 115 S. Ct. 879 (1995)

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Note*

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TABLE OF CONTENTS

* The author would sincerely like to thank Professor Steven L. Willborn, University of Nebraska, College of Law, for his insightful reviews, supportive critiques, and discerning analyses.

I. INTRODUCTION

Janice had enjoyed working for her employer for the past twenty years, but during this past year, her work environment changed when a new supervisor was hired. In just a few short months, her employment became intolerable: her male supervisor made daily advances toward her, cornered her when she was alone, and threatened her with the loss of her job. Janice filed a complaint with the personnel office, but because no one could corroborate her story, the investigation ended, and Janice was discharged by her supervisor.

Janice filed a claim against the company alleging sexual harassment and retaliatory discharge. The company, in defending the suit, engaged in its own informal discovery. In combing through old files, the personnel director checked Janice's employment application, and discovered that five years before applying for a job at the company, Janice had been convicted of possessing illegal narcotics when she was nineteen years old. Janice did not include this conviction on her employment application though it specifically requested such information. The company stated that this omission, constituting after-acquired evidence, should allow the company an order of summary judgment against Janice's claims, because if the company knew of this conviction at the time, Janice would never have been hired. Up until this year, the employer in this case would have had a legal basis in the Fifth,[1] Sixth,[2] Seventh,[3] Eighth,[4] and Tenth[5] Circuits. However, on

1. Redd v. Fisher Controls, 814 F. Supp. 547 (W.D. Tex. 1992), *aff'd*, 35 F.3d 561 (5th Cir. 1994).

January 23, 1995, the United States Supreme Court decided *McKennon v. Nashville Banner Publishing Co.*,[6] which should eliminate summary judgment for employers asserting the defense of after-acquired evidence to defend discrimination cases.[7]

After-acquired evidence refers not only to evidence of an employee's fraud or misrepresentation on a résumé or employment application but also to an employee's on-the-job misconduct[8] which is discovered *after* the employee brings a complaint for unlawful discrimination.

This year, the Supreme Court was presented for the first time with the issue of whether after-acquired evidence of an employee's miscon-

2. Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992).
3. Washington v. Lake County, Ill., 969 F.2d 250 (7th Cir. 1992).
4. Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403 (8th Cir. 1994).
5. Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988).
6. 115 S. Ct. 879 (1995), *rev'g*, 9 F.3d 539 (6th Cir. 1993).
7. Prior to the United States Supreme Court's decision in *McKennon*, the Third, Ninth, and Eleventh Circuits had already limited the scope of the after-acquired evidence doctrine by allowing the employee some recovery. *See* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994), *cert. granted and vacated*, 115 S. Ct. 1397 (1995), *and aff'd in part and remanded in part*, No. 93-3258, 1995 WL 429103 (3d Cir. Jul. 20, 1995); E.E.O.C. v. Farmer Bros. Co., 31 F.3d 891 (9th Cir. 1994); Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992), *vacated pending reh'g en banc*, 32 F.3d 1489 (1994), *and on reh'g en banc*, 62 F.3d 374 (1995); *infra* text accompanying notes 10-36.

   See also Jimenez-Fuentes v. Torres Gaztambide, 807 F.2d 230 (1st Cir. 1985), *cert. denied*, 481 U.S. 1014 (1987)(although not specifically addressing the after-acquired evidence doctrine, the court stated that after-acquired evidence in case was only relevant to future demotions); Smallwood v. United Air Lines, Inc., 728 F.2d 614 (4th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984)(stating that recreating the circumstances that would have existed but for the illegal discrimination can be established by after-acquired evidence provided such evidence is proved at trial on remedy issue); Proulx v. Citibank, 681 F. Supp. 199 (S.D.N.Y. 1988), *aff'd*, 862 F.2d 304 (2d Cir. 1988)(not specifically addressing the after-acquired evidence doctrine but refusing to deny damages based upon speculation).

   Other circuit court decisions have now been rendered since *McKennon* was issued. *See, e.g.*, Russell v. Microdyne Corp., No. 93-1895, 1995 WL 570413 (4th Cir. Sept. 28, 1995); Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106 (5th Cir. 1995); Wehr v. Ryan's Family Steak Houses, Inc., 49 F.3d 1150 (6th Cir. 1995); O'Driscoll v. Hercules, Inc., 52 F.3d 294 (10th Cir. 1995); Ricky v. Mapco, Inc., 50 F.3d 874 (10th Cir. 1995); Manard v. Fort Howard Corp., 47 F.3d 1067 (10th Cir. 1995).
8. For misconduct cases, *see, e.g.*, McKennon v. Nashville Publishing Co., 115 S. Ct. 879 (1995)(employee copied confidential papers and took them home); Summers v. State Farm Mutual Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988)(employee falsified company records during course of his employment); Malone v. Signal Processing Technologies, Inc., 826 F. Supp. 370 (D. Colo. 1993)(remanding case to see whether employee engaged in sexual harassment and misconduct while on job); Schuessler v. Benchmark Mktg. and Consulting, Inc., 243 Neb. 425, 500 N.W.2d 529 (Neb. 1993)(remanding case to determine if employee committed sexual harassment while on job).

duct should bar all recovery for an employee who has been discriminatorily discharged. Only eight short months before, the Eighth Circuit had answered this same question in the affirmative in *Welch v. Liberty Machine Works, Inc.*[9] The Supreme Court, however, has chosen the better route in refusing to deny an employee all relief following a discriminatory discharge. Unfortunately, though, the Supreme Court's curt opinion does not tie in the finer sub-issues of the after-acquired evidence doctrine which may leave employers with loopholes and lower courts with litigation.

This Note will discuss how the recent *McKennon* decision will affect both employers and employees. First, a brief overview will be provided explaining the legal status of the after-acquired evidence doctrine in the circuit courts as it existed immediately prior to the decision in *McKennon*. Second, the facts and the holding of the *McKennon* decision will be discussed. Third, an examination will be undertaken as to why the Court and supporting authorities determined that after-acquired evidence should be irrelevant in determining the employer's liability. Fourth, a showing will be made that though after-acquired evidence should perhaps limit a plaintiff's equitable remedies in appropriate cases, it should be irrelevant in determining legal remedies. Included therein will be a proposal for a more equitable calculation for backpay than the Court in *McKennon* provided. In conclusion, this Note seeks to extend the positive steps offered in *McKennon* by offering a proposal to balance the competing goals of 1) providing a workplace free of discrimination and harassment, which will 2) encourage employees to be honest both when filling out employment applications and after they are hired and working for the employer.

II. BACKGROUND

Prior to the recent *McKennon* decision, proponents of the after-acquired evidence doctrine purported that it would not be fair to allow a "mischievous" employee to recover against an employer even though the employer itself may have acted in a discriminatory or harassing way. Instead of addressing the consequences of discrimination and harassment in the workplace and fashioning solutions to remedy these employment problems, a number of courts had simply foreclosed

9. 23 F.3d 1403 (8th Cir. 1994). The court held that after-acquired evidence of employee misrepresentation will bar recovery for an unlawful discharge, if the employer establishes that it would not have hired the employee had it known of the misrepresentation. *Id.* However, the court confined its holding to determining what effect résumé fraud has on an employee's claim of discrimination. The court declined to discuss how on-the-job misconduct by an employee would affect his or her same claim of discrimination. *See id.*

that possibility by awarding the employer a summary judgment victory.[10]

A. *Summers v. State Farm Mutual Automobile Insurance Co.* and Progeny

In the seminal case of *Summers v. State Farm Mutual Automobile Insurance Co.*,[11] an employee brought suit against his employer alleging that he was terminated because of age and religious discrimination. Defendant State Farm stated that Summers was discharged because of his falsifications of company records, untimely and poor quality of reporting, problems with settlement negotiations and customer relations, and his generally poor attitude. In preparing for trial, State Farm discovered 150 additional falsifications Summers had made on insurance claims while employed. Since the additional falsifications were not found until four years after Summers' discharge, Summers argued that the falsifications were irrelevant and inadmissible. However, State Farm purported that although the additional falsifications could not have been a "cause" for the discharge, they should still be considered.[12]

The Tenth Circuit determined that, because the after-acquired evidence constituted a legitimate reason to fire the employee, the plaintiff had not sustained an injury and no relief was warranted.[13] The court relied on a number of cases including *Mt. Healthy City School District Board of Education v. Doyle*,[14] where the Supreme Court held that if a plaintiff proves the unlawful discharge (in that case a violation of First Amendment rights) was a substantial factor in the defendant's decision not to rehire, then the employer could avoid liability only if it

10. *See, e.g.*, Russell v. Microdyne Corp., 830 F. Supp. 305 (E.D. Va. 1993), *rev'd*, No. 93-1895, 93-2078, 1995 WL 570413 (4th Cir. Sept. 28, 1995)(lower court holding that no distinction exists between liability of employer and remedy to employee when no relief is available because of after-acquired evidence of deception during hiring). *See generally* Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992); Washington v. Lake County, Ill., 969 F.2d 250 (7th Cir. 1992); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988); Baab v. AMR Servs. Corp., 811 F. Supp. 1246 (N.D. Ohio 1993); Rich v. Westland Printers, Inc., No. CIV. A. HAR 92-2475, 1993 WL 220453 (D. Md. June 9, 1993); Benson v. Quanex Corp., No. 90-CV-71996-DT, 1992 WL 63013 (E.D. Mich. Mar. 24, 1992); Kravit v. Delta Airlines, Inc., No. CV-92-0038, 1992 WL 390236 (E.D.N.Y. Dec. 4, 1992); O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992); Churchman v. Pinkerton's, Inc., 756 F. Supp. 515 (D. Kan. 1991); Sweeney v. U-Haul Co., No. 89C3761, 1991 WL 1707 (N.D. Ill. Jan. 9, 1991); O'Driscoll v. Hercules, Inc., 745 F. Supp. 656 (D. Utah 1990), *rev'd*, 52 F.3d 294 (10th Cir. 1995); Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991 (D. Kan. 1989).

11. 864 F.2d 700 (10th Cir. 1988).

12. *Id.* at 702-03.

13. *Id.* at 708.

14. 429 U.S. 274 (1977).

proved it would have reached the same decision even in the absence of the protected conduct.[15] Further, the *Summers* court stated that *Smallwood v. United Air Lines, Inc.*[16] instructed district courts that they should proceed to make the "after-the-fact" rationale. The *Summers* court found State Farm's argument valid and held that "while such after-acquired evidence cannot be said to have been a 'cause' for Summers' discharge . . . it is relevant to Summers' claim of 'injury,' and does itself preclude the grant of any present relief or remedy to Summers."[17] Stating that Summers' argument was "unrealistic," the Tenth Circuit used the following analogy: a company doctor is fired "because of his age, race, religion, and sex, and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a 'doctor.' "[18] The masquerading doctor would not be entitled to relief, and Summers was found to be in no better of a position.

The *Summers* decision was followed by a number of courts including the Sixth, Seventh, and Eighth Circuits. In *Johnson v. Honeywell Information Systems, Inc.*,[19] the forerunner for *McKennon*, the Sixth Circuit adopted the Tenth Circuit's approach and discussed a fraud analysis in its case of application misrepresentation, as opposed to on-the-job misconduct. The court held that the employer would be entitled to summary judgment when the "misrepresentation or omission was material, directly related to measuring a candidate for employment, and was relied upon by the employer making the hiring decision;"[20] the materiality of the employee's educational misrepresentation was substantiated, though, simply because company officials stated that they had relied on this assertion. This line of reasoning has also been applied to cases of sexual harassment as a derivative claim of sexual discrimination.[21]

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15. *Id.* at 287.
16. 728 F.2d 614, 623 (4th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984).
17. Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988).
18. *Id.*
19. 955 F.2d 409 (6th Cir. 1992).
20. *Id.* at 414. The court found that petitioner's misrepresentation of her education was a material misrepresentation upon which the company relied, and that this reliance had been established *as a matter of law. Id.* The petitioner had worked as a field relations manager for eight years without the company suspecting she did not have a college degree. *Id.* at 411.
21. *See, e.g.*, Baab v. AMR Servs. Corp., 811 F. Supp. 1246 (N.D. Ohio 1993)(stating that since appellant admitted that he deliberately falsified his employment application, it would be impossible for him to show that his discharge was a mere pretext and that the real reason for the discharge was intentional discrimination on an unlawful basis); Rich v. Westland Printers, Inc., No. CIV. A. HAR92-2475, 1993 WL 220453 (D. Md. June 9, 1993)(stating that summary judgment is granted when after-acquired evidence of fraud nullifies any remedies, thereby rendering any determination of liability moot); Churchman v. Pinkerton's, Inc., 756 F. Supp. 515 (D. Kan. 1991)(granting summary judgment to the employer

The Seventh Circuit added another slight twist to the résumé fraud analysis and held that "the appropriate issue in an employment discrimination case where the plaintiff lied on his application and was later fired for an unrelated reason is whether the employer, acting in a race-neutral fashion, would have fired the employee upon discovery of the misrepresentation, not whether the employer would have hired the employee had it known the truth."[22] Thus, making a distinction between a standard that focused on "would have fired" and one that centered on "would not have hired," the court chose the former.

The Eighth Circuit continued the *Summers* rationale. The court held that in the application fraud context, as opposed to on-the-job misconduct,[23] the after-acquired evidence of employee misrepresentation bars recovery for an unlawful discharge if the employer establishes that it would not have hired the employee had it known of the misrepresentation.[24] In *Welch,* the employee had omitted on his job application that he had been fired from his previous employer for unsatisfactory performance.

Primarily relying on the *Summers* case, the court noted that "[s]everal other circuits have followed *Summers* and adopted the rule that after-acquired evidence of an employee's misrepresentation bars recovery for a discriminatory discharge when the employer would not have hired, or would have fired, the employee had it known of the misconduct."[25] From this line of reasoning, the Eighth Circuit stated that "[w]e do not believe that an employee should benefit from his or her misrepresentation."[26] While acknowledging that "[p]rimary to the *Wallace*[27] court was the concern that the *Summers* rule created a perverse incentive contrary to the purposes of Title VII,"[28] the Eighth

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and stating that the importance of any previous terminations for cause and prior drug use in an employer's hiring decision cannot be underestimated); Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991 (D. Kan. 1989)(holding that summary judgment is appropriate where the material omissions are directly related to measuring a candidate for employment and were relied upon in the hiring decision).

22. Washington v. Lake County, Ill., 969 F.2d 250, 256 (7th Cir. 1992). The court found no genuine issue of material fact since plaintiff would have been fired if the employer "had discovered the concealment of his convictions and then treated him in a race-neutral manner." *Id.*

23. *See supra* note 8.

24. Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403, 1405 (8th Cir. 1994).

25. *Id.* at 1405.

26. *Id.*

27. The Eighth Circuit is referring to the 1992 opinion of Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992)(footnote added). *See infra* notes 30-36 and accompanying text.

28. Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403, 1405 (8th Cir. 1994).

Circuit still stated that "[w]e find that the *Summers* rule is the better rule."[29]

B. *Wallace v. Dunn Construction Co.*

The doctrine of after-acquired evidence had gained wide acceptance among the courts prior to *Summers* and indeed afterward.[30] However, in 1992, the Eleventh Circuit was the first court to take a strong stance against the *Summers* line of cases in *Wallace v. Dunn Construction Co.*[31] In *Wallace*, the plaintiff alleged a number of claims against her former employer, including a hostile work environment, sexual harassment claim and a retaliatory discharge claim under Title VII alleging that her numerous objections to sexual harassment caused her termination. During discovery, Dunn Construction became aware that the plaintiff had lied on her employment application when she stated she had never been convicted of a crime, when in fact she had pled guilty to drug possession charges.

Stating that the *Summers* rule ignored the time lapse between the unlawful act (such as discrimination) and the discovery of a legitimate motive,[32] the court stated that the *Summers* rule is "antithetical to the principal purpose of Title VII—'to achieve equality of employment opportunity' by giving employers incentives 'to self-examine and self-evaluate their employment practices and to endeavor to eliminate . . . employment discrimination.' "[33] The court stated that the after-acquired evidence is relevant to the relief sought by a successful Title VII plaintiff, but the court required the drawing of a boundary be-

29. *Id.* The court in *Welch*, though, did not grant summary judgment to the employer since the only evidence presented to establish that Welch would have been fired was an affidavit by the company president stating such; no other evidence of the company's policies were offered. The court noted that "in the after-acquired evidence context, the employer knows only the presumed illegal ground for the discharge," *id.*, and the "employer bears a substantial burden of establishing that the policy pre-dated the hiring and firing of the employee in question . . . ." *Id.* at 1406. Since the employer produced a single self-serving affidavit, it did not establish that it had a settled policy of never hiring individuals such as Welch. Despite this decision, the court also noted that "[w]e do not decide whether an undisputed employer affidavit could, in some circumstances, establish the requisite material fact of a particular employer's policy. Rather, we find merely that in this case, Maier's [the company president] affidavit was not sufficient." *Id.*

30. *See supra* note 10.

31. 968 F.2d 1174 (11th Cir. 1992), *vacated pending reh'g en banc*, 32 F.3d 1489 (1994), *and on reh'g en banc*, 62 F.3d 374 (1995).

32. The *Wallace* court correctly made a distinction between the mixed motive analysis where an employee is discharged for both a lawful and an unlawful motive, *see* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *infra* note 73, and the after-acquired evidence analysis where the employee is discharged for an unlawful motive with the lawful motive found later. Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992).

33. Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1180 (11th Cir. 1992).

tween the preservation of the employer's lawful interest and the restoration of the discrimination victim by making the employee whole for injuries suffered from the unlawful employment discrimination.[34] The Eleventh Circuit holding of *Wallace* was vacated pending a rehearing en banc,[35] and the case has since been remanded to comply with *McKennon*.[36] References, however, are included herein to the Eleventh Circuit's 1992 *Wallace* opinion because *Wallace* was the primary opinion to reject *Summers* and a number of courts followed that lead.[37]

C. Facts and Holding of *McKennon v. Nashville Banner Publishing Co.*

After thirty years of employment with Nashville Banner Publishing Company ("the Banner"), Christine McKennon lost her job—allegedly due to a work force reduction plan. At age sixty-two McKennon thought the real reason for her discharge was her age, and she brought suit against the company under the Age Discrimination in Employment Act (ADEA).[38] During discovery, the Banner took McKennon's deposition. McKennon testified she had copied some of the company's financial documents during her last year of employment for her own personal "insurance" and "protection" against a possible discharge due to her age.[39] Stating that McKennon would have been fired had it known of this misconduct, the Banner sought summary judgment on the basis of this after-acquired evidence. The district

34. *Id.* at 1181. The court denied summary judgment to the employer on plaintiff's remedies of backpay, lost wages, and liquidated damages; however, summary judgment was granted as to reinstatement, front pay, and injunctive relief. *Id.*

35. In September of 1994, the Eleventh Circuit vacated its opinion handed down two years earlier and granted a rehearing en banc. Wallace v. Dunn Constr. Co., 32 F.3d 1489, 1490 (11th Cir. 1994). The court stated "[a] member of this court . . . requested a poll on the suggestion of rehearing en banc and a majority of the judges in this court . . . voted in favor thereof . . . ." *Id.*

36. Wallace v. Dunn Constr. Co., 62 F.3d 374 (11th Cir. 1995).

37. *See, e.g.*, Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994), *cert. granted and vacated*, 115 S. Ct. 1397 (1995), *and aff'd in part and remanded in part*, No. 93-3258, 1995 WL 429103 (3d Cir. July 20, 1995); E.E.O.C. v. Farmers Bros. Co., 31 F.3d 891 (9th Cir. 1994). *See also* Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403 (8th Cir. 1994)(discussing and rejecting the *Wallace* holding).

38. *See* McKennon v. Nashville Publishing Co., 115 S. Ct. 879, 882-83 (1995)(stating that McKennon filed her suit pursuant to the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 (1988 ed. & Supp. V)).

Under the ADEA, it is unlawful for an employer "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) (1988 ed. & Supp. V).

39. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 883 (1995).

court granted the Banner's motion and the Sixth Circuit affirmed.[40] The Supreme Court granted certiorari[41] and reversed.[42]

The Court first noted that the ADEA was part of a statutory congressional scheme to eradicate workplace discrimination. Other statutes fulfilling the same purpose include Title VII of the Civil Rights Act of 1964 ("Title VII"),[43] the Americans with Disabilities Act of 1990 ("ADA"),[44] the National Labor Relations Act ("NLRA"),[45] and the Equal Pay Act of 1963 ("EPA").[46] The Court thus sought not to limit its focus to a particular act but to give the after-acquired evidence doctrine the same treatment under a broad statutory design.[47]

The Court stated that there are two objects of these remedial statutes: deterrence and compensation for injuries. In this regard, the Court held that "[i]t would not accord with this scheme if after-acquired evidence of wrongdoing . . . operates, in every instance, to bar all relief for an earlier violation of the Act."[48]

Though the Court found an employer would not be able to escape all liability the Court stated, "even though the employer has violated the Act, we must consider how the after-acquired evidence of the employee's wrongdoing bears on the specific remedy to be ordered."[49] The Court addressed the concern of the employers who should have the discretion to hire, promote, and discharge their employees on nondiscriminatory grounds. In this light, the Court held that as a general rule, reinstatement and front pay would not be appropriate. With regard to backpay, however, the Court stated that "[a]n absolute rule barring any recovery of backpay . . . would undermine the ADEA's

40. McKennon v. Nashville Banner Publishing Co., 9 F.3d 539 (6th Cir. 1993), *aff'g*, 797 F. Supp. 604 (M.D. Tenn. 1992).
41. McKennon v. Nashville Banner Publishing Co., 114 S. Ct. 2099 (1994).
42. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).
43. 42 U.S.C. § 2000e (1988 ed. & Supp. V). *See* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 884 (1995)(noting Title VII is applicable to discrimination concerning race, color, sex, national origin, and religion).
44. 42 U.S.C. § 12101 (1988 ed. & Supp. V). *See* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 884 (1995)(noting that the ADA is concerned with disability discrimination).
45. 29 U.S.C. § 158(a) (1994). *See* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 884 (1995)(noting that the NLRA is concerned with union activities).
46. 29 U.S.C. § 206(d) (1994). *See* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 884 (1995)(noting the EPA is concerned with sex discrimination).
47. The Court noted the similarities between the ADEA and Title VII and stated, "[t]he substantive, antidiscrimination provisions of the ADEA are modeled upon the prohibitions of Title VII," McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 884 (1995), and "[t]he ADEA and Title VII share common substantive feature and also a common purpose: 'the elimination of discrimination in the workplace.'" *Id.* (citation omitted).
48. *Id.*
49. *Id.* at 885.

objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from age discrimination."[50] The beginning point to determine backpay should be a calculation from the date of the unlawful discharge to the date the new information [the after-acquired evidence] was discovered.[51]

III. ANALYSIS

The Supreme Court's opinion in *McKennon* represents an important step toward fulfilling the anti-discriminatory purposes of such statutes as the ADEA, Title VII, the ADA, and the EPA. Indeed, the Court made a significant proclamation in holding that after-acquired evidence should not in every instance relieve employers who have violated anti-discrimination statutes of all liability.[52] While the Court recognized this limitation on liability, it also recognized that employers should have the right to discharge employees for non-discriminatory grounds and thus allowed courts to limit a plaintiff's remedies. Unfortunately, the Court's opinion as to remedies leaves open the possibility that employers can limit remedies which would otherwise make the plaintiff whole.[53] First, a discussion of why after-acquired evidence is irrelevant at the liability stage will be presented. Second, a discussion of the Court's opinion as to remedies will be examined and a proposal to better calculate the remedy of backpay will be explored.

A. The After-Acquired Evidence Doctrine Is Not Relevant in Establishing Employer Liability

The Court discussed primarily two reasons why an employee should not be barred from all relief even though he or she has a past of employment-related wrongdoing: 1) the purpose of anti-discrimination statutes, such as the ADEA and Title VII, would not be fulfilled if after-acquired evidence prohibited any relief; and 2) mixed-motive cases are inapposite to finding liability under the after-acquired evidence doctrine.

1. After-Acquired Evidence Is Not in Accord with the Dual-Purpose of Anti-Discrimination Statutes

The Supreme Court has long recognized the two-fold purpose of Title VII. In *Albemarle Paper Co. v. Moody*,[54] the Court noted that the

50. *Id.* at 886.
51. *Id.*
52. *Id.* at 884.
53. *See infra* notes 102-142 and accompanying text.
54. 422 U.S. 405 (1975).

primary objective of Title VII was designed to "'achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group . . . .'"[55] In other words, the statute seeks to deter employers from engaging in discriminatory conduct. Second, Title VII was designed to "make persons whole for injuries suffered on account of unlawful employment discrimination."[56]

In *McKennon* the Court reaffirmed this focus. In view of the deterrence function, the Court stated that statutes such as Title VII and the ADEA "serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate so far as possible, the last vestiges' of discrimination."[57] With regard to providing compensation, the Court noted that "an injured employee [has] a right of action to obtain the authorized relief."[58] The Court found that "[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA."[59]

When employers were allowed to evade liability under the after-acquired evidence doctrine, as the Eighth Circuit held was plausible,[60] employers were not deterred from discriminating against their employees, and plaintiffs were not "made whole" via compensation for their injuries. After all, what incentives would exist for an employer to comply when a quick check through an employee's personnel file may resolve the dispute early—that is, before any of the employer's discriminatory practices are known to a court and to the society in which the employer does business. A strong deterrence policy is imperative to force apathetic employers to educate their workforce and to discipline the same when violations to another's civil liberties are made.[61]

Last year in *Mardell v. Harleysville Life Ins. Co.*,[62] the Third Circuit had adopted the reasoning of *Wallace* and in addition to discussing the purposes of anti-discrimination statutes, also addressed the injuries of discrimination victims as well as the public interest in en-

55. *Id.* at 417 (citation omitted).
56. *Id.* at 418.
57. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 884 (1995)(quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975)).
58. *Id.*
59. *Id.*
60. *See* Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403 (8th Cir. 1994), and *supra* text accompanying notes 23-29.
61. *See* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1235 (3d Cir. 1994), *cert. granted and vacated*, 115 S. Ct. 1397 (1995), *and aff'd in part and remanded in part*, No. 93-3258, 1995 WL 429103 (3d Cir. Jul. 20, 1995).
62. 31 F.3d 1221 (3d Cir. 1994). Although the Third Circuit affirmed much of its 1994 opinion in Mardell v. Harleysville Life Ins. Co., No. 93-3258, 1995 WL 429103 (3d Cir. Jul. 20, 1995), it is the court's 1994 opinion where the bases for its decision were discussed.

forcement of anti-discrimination statutes. These areas of concern, only briefly mentioned in *McKennon*, deserve further elaboration to supplement why after-acquired evidence is irrelevant at the liability stage.

a. *Injuries in Discrimination Contexts Are Real and Are Not Erased by Fortuitous After-Acquired Evidence*

While the *Summers* court was correct when it stated that "after-acquired evidence cannot be said to have been a cause for Summers' discharge,"[63] it did not carry through this logic when it concluded that the after-acquired evidence "is relevant to Summers' claim of *injury*, and does itself preclude the grant of any present relief or remedy to Summers."[64]

Logic and common sense should dictate that no matter what the employee has done by way of misrepresentations or on-the-job misconduct, the employee has also suffered an injury. Although some courts state that the employee suffers no injury because the defendant either would not have hired or would have fired the employee once it learned of the misrepresentation or misconduct,[65] this approach is flawed. The *Mardell* court rejected this so-called no-standing argument noting that statutes such as Title VII grant standing to any individual discriminated against by a covered employer, and an employee is defined as " 'an individual employed by an employer.' "[66] The court also noted that there is no exception in Title VII for individuals who would not have been employed but for their fraud or misconduct.

Further, because the employer in an after-acquired evidence situation learns of the justification for the employee's firing only after the employee seeks to assert his or her rights, the employee does suffer a real injury—"the elimination of his right to bring a successful suit for

63. Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988).

64. *Id.* (emphasis added).

65. *See generally* Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992); Washington v. Lake County, Ill., 969 F.2d 250 (7th Cir. 1992); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988); Baab v. AMR Servs. Corp., 811 F. Supp. 1246 (N.D. Ohio 1993); Rich v. Westland Printers, Inc., No. CIV. A. HAR 92-2475, 1993 WL 220453 (D. Md. June 9, 1993); Benson v. Quanex Corp., No. 90-CV-71996-DT, 1992 WL 63013 (E.D. Mich. Mar. 24, 1992); Kravit v. Delta Airlines, Inc., No. CV-92-0038, 1992 WL 390236 (E.D.N.Y. Dec. 4, 1992); O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992); Churchman v. Pinkerton's, Inc., 756 F. Supp. 515 (D. Kan. 1991); Sweeney v. U-Haul Co., No. 89C3761, 1991 WL 1707 (N.D. Ill. Jan. 9, 1991); O'Driscoll v. Hercules, Inc., 745 F. Supp. 656 (D. Utah 1990), *rev'd*, 52 F.3d 294 (10th Cir. 1995); Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991 (D. Kan. 1989).

66. Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1231 (3d Cir. 1994)(citing 42 U.S.C.A § 2000e-2(a) (1981) and 42 U.S.C.A. § 2000e(f) (1981)).

illegal discrimination against his employer."[67] Likewise, the Court in *McKennon* stated that statutes such as Title VII provide a venue for employees to illuminate such discriminatory practices in the workplace. In this regard, the Court noted:

> The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance. The efficacy of its enforcement mechanisms becomes one more measure of the success of the Act.[68]

Whether the employee has made a misrepresentation or not, an *injury* has occurred. Justice Arnold of the Eighth Circuit offered this analogy:

> [L]et us assume that Mr. Welch was a tortfeasor: That fact could not possibly excuse the commission of a tort against him. I doubt that the court would allow the defendant, for instance, to justify a battery on Mr. Welch on the ground that he would not have been available for battering but for his misrepresentations. I cannot see how this case stands on a different footing.[69]

One would be hardpressed to argue that the employee who suffered a battery committed by the employer did not at that moment suffer an injury despite what evidence may later relate to the person's employment history. The injury occurs at the moment the battery occurs. In addition to the economic injuries suffered in discrimination cases, an intangible injury occurs at the moment of discrimination or harassment by the employer. Employment discrimination causes a victim to suffer a "dehumanizing injury," and causes a significant injury to the victim's dignity and demoralizes his or her self-esteem.[70] Even the Supreme Court previously recognized that discrimination causes "grave harm" to its victims.[71] Just as the employee who endures a battery has suffered a real injury, the victim who endures employment discrimination has suffered the same.

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67. Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After-Acquired Evidence in Title VII Litigation,* 26 CONN. L. REV. 145, 163 (1993).

68. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 885 (1995). The Court also stated, " '[T]he private litigant [in Title VII] not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.' " *Id.* at 884 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974)).

69. Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403, 1406 (8th Cir. 1994)(Arnold, J., dissenting).

70. Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1232-33 (3d Cir. 1994).

71. *See* United States v. Burke, 112 S. Ct. 1867, 1872 (1992)(noting that "[i]t is beyond question that discrimination in employment on the basis of sex, race, or any of the other classifications protected by Title VII is an . . . invidious practice . . . .").

b. There Exists a Public Interest in Refuting Summers

The Court briefly addressed the concern of society in its opinion when it stated "[t]he ADEA, . . . as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions."[72] Additionally, in *Price Waterhouse v. Hopkins*,[73] Justice O'Connor noted that the first purpose of Title VII is to deter conduct identified as contrary to *"public policy and harmful to society as a whole."*[74] She continued by stating that "[t]his Court's decisions under the Equal Protection Clause have long recognized that whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual."[75] Additionally, the purpose of the Civil Rights Act of 1991 is to promote equality and to provide for victims of discrimination and harassment in the workplace, a matter of public interest.[76]

Further, as the court in *Mardell* pointed out, the "anti-employment discrimination laws Congress enacted consequently resonate with a forceful public policy vilifying discrimination."[77] The Third Circuit recognized the fact that Congress has responded to misconceptions developed through stereotypes and biases by enacting humanitarian laws designed to "wipe out the inequity of discrimination in employment, not merely to recompense the individuals so harmed but principally to deter future violations."[78] Recognizing that an employee's misconduct or fraud could be a wrong against the employer, the *Mardell* court added that an employer's discrimination is wrong against not only the employee, but also society.[79]

2. Mixed-Motive Cases Are Inapposite in Determining Liability in the After-Acquired Evidence Context

The Court in *McKennon* stated that the *Summers* holding made an unwarranted extension of *Mt. Healthy*, for in the latter, the employer was operating on both a proper motive and an improper one when it discharged an employee.[80] That case was not applicable to McKennon's situation; the Court explained, "McKennon's misconduct was not discovered until after she had been fired. The employer could not have

72. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 884 (1995).
73. 490 U.S. 228, 264 (1989).
74. *Id.* (O'Connor, J., concurring)(emphasis added).
75. *Id.* at 265.
76. Joyner v. Monier Roof Tile, Inc., 784 F. Supp. 872, 879 (S.D. Fla. 1992).
77. Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1234 n.21 (3d Cir. 1994).
78. *Id.* at 1234.
79. *Id.*
80. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 885 (1995).

been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason."[81]

The Court continued by stating that mixed motive cases[82] are inapposite to after-acquired evidence cases except, the Court stated, "to the important extent they underscore the necessity of determining the employer's motives in ordering the discharge, an essential element in determining whether the employer violated the federal antidiscrimination law."[83]

A number of sources had so previously noted the distinction between mixed-motive and after-acquired evidence cases including the Eleventh Circuit in *Wallace* which stated:

> Whereas the *Mt. Healthy* rule excuses all liability based on what *actually* would have happened absent the unlawful motive, the *Summers* rule goes one step further: it excuses all liability based on what *hypothetically* would have occurred absent the alleged discriminatory motive *assuming the employer had knowledge that it would not acquire until sometime during the litigation arising from the discharge.*[84]

Not only did the Third[85] and Ninth[86] Circuits adopt this view before the Supreme Court's opinion in *McKennon*, the Equal Employ-

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81. *Id.*

82. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Four justices (with Justice O'Connor and Justice White concurring in the judgment) held that "when a plaintiff in a Title VII case proves that her gender played a part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." *Id.* at 258. Hopkins alleged that sex discrimination was the reason that she was denied a partnership at Price Waterhouse. However, Price Waterhouse argued that Hopkins lacked interpersonal skills necessary for such a position. Because the lower courts required the employer to prove it would have made the same decision irrespective of plaintiff's gender by clear and convincing evidence, the case was remanded.

Justice White explained the difference between mixed-motive cases and pretext cases: "In pretext cases, 'the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision . . . . In mixed-motives cases, however, there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate." *Id.* at 260 (quoting NLRB v. Transportation Management Corp., 462 U.S. 393, 400 n.5 (1983)).

See also McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)(holding in a pretext case that since the plaintiff met his burden of proving racial discrimination, and since the employer subsequently then articulated a legitimate, nondiscriminatory reason for the employee's rejection, the employee had another opportunity on remand to show that the employer's stated reason was in fact pretext).

83. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).

84. Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1179 (11th Cir. 1992).

85. *See* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994). The court distinguished between "mixed-motive" and "pretext" cases on one hand and after-acquired evidence cases on the other. The court stated that the employer's proffered, "legitimate" reason, which did not exist at the time of the discharge, could not have possibly motivated the employer in the after-acquired evidence situa-

ment Opportunity Commission (EEOC),[87] as well as a number of lower courts[88] and commentators,[89] had likewise perspectives. Even in the Eighth Circuit, Justice Arnold in his dissenting opinion stated, "I think the objects of deterrence and compensation both require us to examine a defendant's mind for what it contained, not what it might have contained, to determine whether he has committed a wrong."[90] Further support is also found in arbitration disputes where labor arbitrators have stated that the correctness of a discharge "must stand or fall upon the reason given at the time of the discharge."[91]

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tion. The court held that "[a]fter-acquired evidence, simply put, is not relevant in establishing liability under Title VII . . . because the sole question to be answered at that stage is whether the employer discriminated against the employee on the basis of an impermissible factor at the instant of the adverse employment action." *Id.* at 1228.

The court, however, stated:

> [A]fter-acquired evidence of resumé and/or application fraud or employer [sic] misconduct on the job is relevant to at least some issues at the remedies stage . . . even if it has surfaced after the employer's searching inquiry in the aftermath of the employer's [sic] unlawful conduct or in the course of its trial preparation.

Id. at 1238.

86. *See* E.E.O.C. v. Farmer Bros. Co., 31 F.3d 891 (9th Cir. 1994).

87. The EEOC had stated that if an employer terminates an employee on the basis of a discriminatory motive, and discovers a legitimate basis for termination only afterward, then the legitimate reason was not a motive for the action as it may partly have been in a mixed-motive context. EEOC COMPL. MAN. (CCH) ¶ 2095 (Sept. 1992).

88. *See, e.g.*, Schuessler v. Benchmark Marketing and Consulting, Inc., 243 Neb. 425, 500 N.W.2d 529 (Neb. 1993), where the Nebraska Supreme Court recognized that two federal circuit courts (at that time) had allowed some recovery for plaintiffs in *discriminatory terminations*. The *Schuessler* court remanded the case before it to determine whether the plaintiff's on-the-job misconduct (sexual harassment of a co-employee) had occurred and whether that misconduct would justify termination. The court stated that if both issues were answered affirmatively, then the plaintiff would be barred from recovery utilizing a *Summers* approach. The court distinguished the cases of *discriminatory terminations* stating "the rationale for allowing recovery [in those cases] appears to be that the employer should not be excused from its discrimination; i.e., the employer's liability should not depend on whether the employee also engaged in misconduct . . . . That situation is vastly different from the simple *breach of contract action* now before us." *Id.* at 441, 500 N.W.2d at 541 (emphasis added)(citation omitted).

89. Other commentators have also opined that courts should separate liability from remedies. *See, e.g.*, McGinley, *supra* note 67 (stating that courts should never use after-acquired evidence as a total defense or as a basis for refusing to grant an injunction, declaratory relief, attorney's fees, and costs); Kenneth G. Parker, Note, *After-Acquired Evidence in Employment Discrimination Cases: A State of Disarray*, 72 TEX. L. REV. 403 (1993)(arguing that the proper treatment of after-acquired evidence would never allow such evidence to affect the employer's liability).

90. Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403 (8th Cir. 1994).

91. *See In re* Columbus Metro. Hous. Auth., 3 Lab. Rel. Rep. (BNA)(103 Lab. Arb.) 104 (Oct. 12, 1994)(Fullmer, Arb.)(quoting United Paperworkers Int'l Union v.

The Court's rejection of an employer's reliance on its after-acquired good fortune comports with common sense. An employer who terminates someone solely because she is, for example, Hispanic, and then discovers months or even years later that the employee had made a false application or was stealing from the company cash register, has not the benefit of a lawful reason for the original discharge. The discharge was simply discriminatory and would be, in this example, in violation of Title VII. It was only good fortune for the employer that the plaintiff had a tainted background, and good fortune should not be the basis for granting summary judgment in favor of the employer. The employer is just as culpable whether or not the employee is later found to have been fraudulent.[92]

In 1989, the Supreme Court, in *Price Waterhouse v. Hopkins*,[93] had essentially confirmed that the *Mt. Healthy* principle was applicable to Title VII.[94] Though *Summers* was on a faulty footing when it relied on *Mt. Healthy*, it should now be apparent that even the *Mt. Healthy* decision has crumbled. Though unaddressed in *McKennon,* the analysis underlying the mixed-motive cases was altered by Congress when it enacted the Civil Rights Act of 1991.[95] The Act now provides in pertinent part that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion,

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Misco, Inc., 484 U.S. 29 (1987) for the proposition that the arbitrator should not consider evidence not relied on by the employer in ordering the discharge). There is, however, a difference between arbitration disputes and court disputes which must be noted. First, arbitration disputes arise due to a violation of a collective bargaining agreement; in other words, the parties have had the opportunity to negotiate terms long before the dispute arises. The Supreme Court noted that evidentiary matters were left to the arbitrator under the agreement and that "[t]he parties bargained for arbitration . . . and were free to set the procedural rules for arbitrators to follow if they chose." United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 39 (1987).

Second, arbitration is usually a precursor to termination. Neither collective bargaining nor neutral liaisons typify the majority of employer-employee relationships where the parties are governed by employment at-will doctrine. The arbitrator in *Columbus* rejected the employer's reliance on the Sixth Circuit cases where employers defeated claims utilizing the doctrine of after-acquired evidence. The arbitrator noted such a difference and stated that "each of these cases [in the Sixth Circuit] involved statutory interpretation (Rehabilitation Act, Title VII and Age Discrimination in Employment Act) rather than arbitration under labor *agreements*." *In re* Columbus Metro. Hous. Auth., 3 Lab. Rel. Rep. (BNA)(103 Lab. Arb.) 104 (Oct. 12, 1994)(Fullmer, Arb.)(emphasis added).

92. Though the Eighth Circuit recognized this logic when it stated that "[i]n the after-acquired evidence context, the employer knows only the presumed illegal ground for the discharge," Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403, 1405 (8th Cir. 1994), the court misapplied this reasoning at the liability stage in following the *Summers* rationale.

93. 490 U.S. 228 (1989).

94. *Id.* at 247-50.

95. *See* McGinley, *supra* note 67, at 187 (stating that "*Price Waterhouse* was one of the cases that Congress amended through its legislative action.").

sex, or national origin was a motivating factor for any employment practice, *even though other factors also motivated the practice.*"[96] The Civil Rights Act of 1991 was passed to "strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination. . . ."[97] and to expand "the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."[98] Thus, even though an after-acquired evidence case should not be subjected to the same analytical scrutiny of a mixed-motive case, it is evident that the underpinnings of mixed-motive cases have been subjected to legislative revamping.

B. The After-Acquired Evidence Doctrine Is Only Minimally Relevant When Examining Equitable Remedies and Should Be Completely Irrelevant When Awarding Legal Remedies

Since the range of available remedies may vary slightly with the particular statute a plaintiff invokes, this section will be analyzed by examining individual remedies and discussing why certain remedies should not be limited in discrimination cases.[99] Underlying this analysis are two guiding statements. The first comes from the earlier Supreme Court opinion in *Albemarle* which noted that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[100] Second, one should take heed of the words of caution expressed by the Third Circuit: "The court should, of course, be cautious [in determining plaintiff's remedies] lest the remedies evidence affect the liability verdict."[101]

1. Equitable Remedies

a. Backpay

Twenty years ago, the Court in *Albemarle* had stated that once unlawful discrimination has been determined, backpay should be denied

96. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e-2(m) (1991 & Supp. 1994)(emphasis added)).

97. McGinley, *supra* note 67, at 186 (quoting Civil Rights Act, Pub. L. No. 102-166, 105 Stat. 1071 (1991)).

98. McGinley, *supra* note 67, at 186 (quoting Civil Rights Act, Pub. L. No. 102-166, § 3, 105 Stat. 1071 (1991)).

99. The guiding policy goals of Title VII, to eradicate discrimination and to make plaintiff whole when discrimination does occur, *see* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), and *supra* text accompanying notes 54-56, provide the framework to discussing which remedies are available to a plaintiff and to what extent they should be awarded.

100. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)(quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

101. Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1238 (3d Cir. 1994).

only for reasons which would "not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[102] Noting that the "make whole" provision of Title VII is reaffirmed by legislative history, the Court stated:

> In dealing with the present section 706(g) [of Title VII] the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.[103]

In *McKennon*, however, the Court provides no clear focus as to how to adequately fulfill this "make whole" provision. In its discussion of backpay, a two-paragraph devotion, the Court does once again acknowledge that backpay should restore the employee to the position he or she would have been in absent the discrimination.[104] However, almost apologetically, the Court states that the make-whole purpose of compensation "is difficult to apply with precision where there is after-acquired evidence of wrongdoing that would have led to termination on legitimate grounds had the employer known about it."[105] The Court's only answer is as follows: "The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered."[106]

The Equal Employment Opportunity Commission (EEOC) has also focused on the date the new information was discovered as a termination date for backpay. It states that if a plaintiff is terminated for discriminatory reasons, and the employer later discovers misconduct such as theft, then the employer would not be subject to backpay after the date of the discovered theft if it established it had an absolute policy of firing anyone who commits a theft.[107] This view, however, is short-sighted. Based on this approach, an employer who did not know of the theft at the time of its discriminatory termination, and who only learned of such theft because of its discrimination, would in this case be encouraged to rifle through the employee's personnel files and interrogate the employee's co-workers and supervisors at any later date in time to find any indication which could limit the employee's backpay period. Plaintiff's backpay could be limited to a mere day or

102. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).
103. *Id.*
104. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 886 (1995).
105. *Id.*
106. *Id.*
107. EEOC COMPL. MAN. (CCH) ¶ 2095 (Sept. 1992).

two which would indeed have a chilling effect on employees who have legitimate discriminatory claims.

While the *McKennon* opinion does acknowledge this dilemma, the Court's opinion leaves open the possibility that victims of employment discrimination will not be made whole. The Court tersely states:

> The concern that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims under the Act is not an insubstantial one, but we think the authority of the courts to award attorney's fees . . . and in appropriate cases to invoke the provisions of Rule 11 of the Federal Rules of Civil Procedure will deter most abuses.[108]

The Court does not delineate how attorney's fees or Rule 11 sanctions will make employees whole in their discrimination claims. First, the reference to Rule 11 sanctions seems ineffective to fulfill this purpose. According to Rule 11 of the Federal Rules of Civil Procedure, an attorney *may* be sanctioned[109] if the attorney presents a pleading, motion or other paper which is presented for any improper purpose such as to harass or cause delay or increase the cost of litigation; or if the pleading, motion, or paper is not warranted under existing law or is a frivolous argument for the extension, modification, or reversal of existing law or establishment of new law; or that factual contentions have no evidentiary support.[110]

The Advisory Committee Notes to Rule 11 ("Committee Notes") state that the amendment requires the litigants to "stop-and-think" before initially making legal or factual contentions.[111] However, a search for after-acquired evidence is not making a legal or factual contention. It is simply not improper to search for what may be relevant information to limit a plaintiff's remedies. Thus the employer who finds, through informal discovery, that it has a remedial safeguard in the after-acquired evidence doctrine should not be subject to Rule 11 sanctions in the first place. Additionally, even if the search could be remotely characterized as improper, plaintiffs' attorneys will not even know of the employer's in-house search unless evidence of wrongdoing is found and used. An attempt to hinge a sanction on the result of evidence rather than the conduct seems an awkward approach. Further, the Committee Notes explain that Rule 11 also provides "protection against sanctions if [attorneys] withdraw or correct contentions

108. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 887 (1995).

109. FED. R. CIV. P. 11 (emphasis added). The 1994 amendment to Rule 11 of the Federal Rules of Civil Procedure made the sanctions under the Rule discretionary as opposed to mandatory. *See also* Fed. R. Civ. P. 11 (1983)(stating that "[i]f a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, *shall* impose upon the person who signed it . . . an appropriate sanction . . . .")(emphasis added).

110. FED. R. CIV. P. 11.

111. FED. R. CIV. P. 11 (Committee Notes).

after a potential violation is called to their attention."[112] Thus, even if the defense is later found to be invalid, Rule 11 provides that the violating party receive notice and a reasonable opportunity to respond.[113]

Additionally, the focus of Rule 11, like that of attorney's fees, is to deter attorney abuses, not to make plaintiffs whole. The Committee Notes state, "Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty."[114] Only under unusual circumstances will the person violating the rule be required to make payment to those injured. The Committee Notes continue, "Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation . . . ."[115] Even in the unusual case where 1) there is a sanction found and 2) costs are paid to the plaintiff's attorney instead of the court, the plaintiff will not be made whole in its backpay award by having sanctions paid to his or her attorney when that attorney's services would be unnecessary in the first place if no discrimination had occurred.

The Court also states that an award of attorney's fees may prevent employers from engaging in post-discharge discovery into the plaintiff's background. Although the opinion is silent as to the matter, one can imagine that an award of attorney's fees will make it more costly for an employer to depose future witnesses. For example, when an employer deposes the plaintiff's supervisor, the employer will presumably have to pay for the plaintiff's attorney to attend the deposition, thus making it more expensive for the employer to conduct depositions on the issue of after-acquired evidence.

Assuming this resolution is what the Court implied, it still leaves much room for inequity for employees with valid discrimination claims. First, the discretion to award attorney's fees comes from the courts. Although attorney's fees are generally awarded to plaintiffs in discrimination cases,[116] courts may begin to exercise such discretion when presented with an employer who has an upstanding reputation in the community and a plaintiff who has been stealing from the company for years. Or a court may decide to award attorney's fees for conducting depositions but not for the amount of time it would take a

112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. CHARLES A. SULLIVAN ET AL., FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 9.8, at 570-71 (1980)(stating that appellate courts have narrowly construed any exceptions).

plaintiff's attorney to verify a false résumé.[117] What the Court's answer provides is at the very least an opportunity for inequity among similarly situated plaintiffs.

Second, and more importantly, the Court's approach to backpay does not comply with the purpose of the discrimination statutes: to make the plaintiff whole. To explain, an award of attorney's fees only becomes relevant when the plaintiff's attorney becomes involved. During *informal* discovery, the employer who wishes to find after-acquired evidence can still interrogate an employee's co-workers and supervisors. It can still dig through the employee's application and résumé and verify information. During this time, which could only be a few days, it only costs the employer its own time; this was the case prior to *McKennon* anyway. And as *McKennon* now implies, a court should begin to fashion a backpay remedy from the date the employee is unlawfully discharged to the date the employer actually discovers the after-acquired evidence. Logically, an employer will still conduct such in-house discovery; the employer will want to know what defenses it has to limit plaintiff's remedies and how it can utilize this defense quickly.

What the Court's solution does is allow the employer to engage in informal discovery into the plaintiff's past and, upon finding after-acquired evidence, then decide whether the cost of extra attorney fees using the after-acquired evidence doctrine would be more or less than the difference between the full backpay award without the defense and a limited backpay award with the defense. When the employer focuses on one or two deponents or restricts its résumé investigations to the damaging source, the attorney's fees it may be required to expend on a valid defense (if a court even decides to award attorney's fees) may be far less than the outlay for additional backpay given the amount of time between either 1) the discharge and settlement if the employer does not defend against the discrimination charge or 2) the discharge and the judgment of the court if the employer defends on the discrimination charge and loses. In fact, given the length of time suits take, the employer who decides to defend against the discrimination claim will still likely be encouraged to rely on after-acquired evidence; if it loses on the underlying claim, at least it won't lose a substantial amount of backpay.

In any event, this result does not focus on the employee by attempting to put him or her in the same position he or she would have been absent the discrimination. If the employee was never discriminated against, the employee would not need the services of an attorney in the first place. Moreover, if the employee was never

117. At the very least, the award of attorney's fees must be "reasonable on the basis of the time necessarily spent and the nature of the effort required." STUART M. SPEISER, ATTORNEYS' FEES § 14:41, at 65-66 (1973).

discriminated against, the after-acquired evidence would never have been discovered. Thus, relieving the employee of additional attorney's fees does not seem to fulfill the statutory purpose of making the plaintiff whole again for the discrimination he or she has suffered with respect to backpay. Instead, the Court's opinion simply focuses on the employer and forces it to engage in an economic analysis to determine which venue will cost it less.

The Court characterizes the employer's investigations into the discharged employee's past as "abuses" on the part of the employer.[118] However, it hardly seems an abuse on the part of the employer to engage in discovery and conduct an economic analysis to limit its liability. It seems natural to search for after-acquired evidence if the cutoff date for backpay is to be the date the after-acquired evidence was actually discovered. Although the Court states 1) that this beginning calculation may be affected by "extraordinary equitable circumstances . . . of either party,"[119] and 2) relies on possible deterrents such as Rule 11 and attorney's fees, there seems to be another more equitable solution to the problem of establishing backpay—one which better serves the make-whole provisions of anti-discrimination statutes and encourages employers to be more careful in the first place.

In 1992, the court in *Wallace* attempted to apply the "make whole" provision of Title VII and did not limit its backpay analysis to the date the after-acquired evidence was discovered. The *Wallace* court determined that the employer could limit the total amount of backpay due to a plaintiff if it could establish that "it *would have* discovered the after-acquired evidence prior to what would otherwise be the end of the backpay period in the absence of the allegedly unlawful acts and this litigation."[120] In its brief to the Supreme Court, Petitioner in *McKennon* notes that under *Wallace*, backpay will cut off at the point in

118. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 887 (1995)(stating that Rule 11 sanctions and an award of attorney's fees will deter most abuses).

119. *Id.* at 886.

120. Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1182 (11th Cir. 1992)(emphasis added). However, after *McKennon*, the Eleventh Circuit did not carry through with this logic. Citing Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106, 1108 (5th Cir. 1995), the Eleventh Circuit stated:

> We join the Fifth Circuit in concluding that "the pertinent inquiry . . . is whether the employee would have been fired upon discovery of the wrongdoing, not whether he would have been hired in the first instance." This approach is consistent with the Supreme Court's acknowledgement that the two dates which are relevant for the purpose of calculating backpay are the date of termination and the date that the employer discovered the fraud.

Wallace v. Dunn Constr. Co., 62 F.3d 374, 379 n.8 (11th Cir. 1995)(citations omitted). Although the court notes the "would have been fired" timeframe, it follows the Supreme Court in stating that the cutoff date for backpay is the date of actual discovery of the wrongdoing. Although the Eleventh Circuit must follow the Supreme Court, the two approaches are not "consistent" as the Court states.

time at which, but for the discrimination, the employer would have discovered the relevant information and would have dismissed the employee. The implication of this assertion is 1) that the employer would have discovered the misrepresentation or misconduct on its own accord, and 2) the plaintiff's action would justify grounds for dismissal. Though the *Wallace* court did not specify what type or quantum of evidence would need be set forth by an employer who sought to limit this period of backpay, it is necessary to examine what level of proof *should* be required by employers at the two different stages: 1) the discovery stage, and 2) the dismissal stage.

With regard to the first stage, the initial approach should first be to focus on that point in time when the plaintiff would have lost his or her job for *non-discriminatory reasons*,[121] if that can be determined. For example, if the employer had a prescheduled date that it was going out of business (and it in fact did do so), then the plaintiff's backpay should be limited to that date of closing.[122] Of course, the problems do not typically arise with this situation. Indeed, the employer will usually try to show that it would have discovered the misrepresentation or misconduct on its own accord even without a specific and concrete date.

The would-have discovered analysis must be circumscribed to protect the employee. When a court receives evidence that an employer would have discovered the plaintiff's misrepresentation or on-the-job misconduct despite the fact plaintiff has begun a suit against the employer, it must be recognized that this will be a clear and open invitation for the employer to participate in post-hoc evaluations to justify its asserted defense. As the old adage goes, hindsight is 20/20. With a clear focus, an employer would likely assert numerous contentions of when and how it would have found plaintiff's misconduct or misrepresentation. Since mere speculation or even a high degree of probability should not limit the plaintiff's backpay award,[123] any proffered reason

121. *See* Brief for Petitioner at *35-36, McKennon v. Nashville Banner Publishing Co., No. 93-1543, 1994 WL 385636 (July 21, 1994).

122. *Id.* at *36. Additionally, Petitioner noted that even reducing a backpay award due to the discovery of after-acquired evidence would be inconsistent with Albemarle Paper Co. v. Moody. Petitioner stated:

> [A]ctions taken by an employer in violation of federal anti-discrimination law may understandably prompt a response by the intended victim of that statutory violation, including steps to protect his or her legal rights. Where an employer in turn seizes that response as providing a justification for dismissal, the entire train of events is one that would not have occurred "but for" the original statutory violation. In at least some circumstances it would be inappropriate to reduce the remedy accorded to a discrimination victim merely because of his or her response to that violation.

Brief for Petitioner at *37.

123. *But see* Parker, *supra* note 89, at 439 (stating that speculation is an inherent part of determining liability and remedy, and so speculation concerning the role of

by the employer to limit backpay because it would have discovered the misrepresentation or misconduct should consequently be proved by clear and convincing evidence.[124]

Subjecting the employer to this higher burden of proof at the discovery stage is not contrary to the Supreme Court's holding in *Price Waterhouse*. There the Court held that the employer in a mixed-motive case must prove by a *preponderance of the evidence* that it would have made the same employment decision in the absence of discrimination.[125] At this stage of analysis, however, the only concern is whether the employer *would have discovered* the hidden information, not whether the employer would have acted on it. By subjecting the employer to this initial higher burden to prove it would have discovered the hidden evidence, we can strive to guarantee the make-whole provisions of statutes such as Title VII, while at the same time respecting the employer whose anticipated actions would bring it closer to the employer whose backpay outlay would terminate because it was going out of business.

The clear and convincing standard at the discovery stage seems also the better alternative than the actual discovery date of the misconduct. First, as stated previously, attorney's fees and Rule 11 sanctions do not serve to make the plaintiff whole. Second, even if "extraordinary equitable circumstances" urge a court to alter the plaintiff's backpay award, it would seem likely that a court would look to the "would have discovered" date anyway to form its calculation. With that view, some courts may adopt a preponderance test while others may opt for the higher burden. Stating instead that backpay will be cutoff at the date that the employer, by clear and convincing evidence, "would have discovered" the misconduct, both safeguards against short-changing the plaintiff in his or her backpay award, and forces employers to enact and follow more uniform screening policies and procedures to meet its burden of proof.

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after-acquired evidence should be within the range of courts' fact-finding capabilities).

124. One commentator has argued that if the employer can prove *by a preponderance of the evidence* that it would have discovered the misrepresentation without the ensuing litigation, then that should be the cut off date for awarding backpay. *See* McGinley, *supra* note 67, at 197. The danger of this lower burden of proof, however, is that it could encourage employers to shop for reasons to state it would have discovered the misrepresentation. Another commentator, however, has also suggested that the clear and convincing evidence standard be used. *See* Cheryl K. Zemelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 209-10 (1993)(drawing no distinction between the discovery stage and the dismissal stage, Zemelman argues that during the relief determination, either the higher burden should be used or that the preponderance standard should be applied more rigorously).

125. Price Waterhouse v. Hopkins, 490 U.S. 228, 249 (1989).

With regard to the second stage, it becomes necessary to inquire whether plaintiff's actions would justify a dismissal. The Court in *McKennon* found that for an employer to rely upon after-acquired evidence, it must establish that the conduct was "of such severity that the employee in fact would have been terminated . . . ."[126] However, stating that conduct must be severe does not establish what level of proof needs to be shown by the employer that it would have discharged the employee. For example, an employer may seek to discharge a particular employee for lying on an employment application. This may be considered "severe" but if other current employees have also lied on their applications and still remain at work, then the employer has not proven it "would have discharged" the employee in question regardless of the alleged severity. Indeed, an employer's single affidavit written after the fact should not be sufficient to establish the fact that the employer would have fired the individual. In its Supreme Court brief, the petitioner in *McKennon* warned against this practice:

> [A]n affidavit which merely asserts in conclusory terms that an employer would have dismissed the plaintiff is not by itself sufficient to meet that burden. Such a bald assertion may reflect, not any consideration of the employer's past practices, but only the witness's personal attitude toward the plaintiff, an attitude all too likely colored by the charge of discrimination or an understandable desire to limit the defendant's liability.[127]

The *Welch* court also stated that "the employer bears a substantial burden of establishing that the *policy pre-dated* the hiring and firing of the employee in question and that the policy constitutes more than mere contract or employment application boilerplate."[128] Rather than the focus being on the severity of the misconduct, the proper analysis seems whether the employer can prove it would have discharged the employee. In this regard, it is still important to examine the burden of proof required.

In its earlier opinion in *Price Waterhouse*, the Supreme Court held that the employer could limit its backpay award if it proved that by a preponderance of the evidence, it would have made the same decision to dismiss the plaintiff.[129] However, there are two notable concerns with relaxing the burden of proof.

First, the mixed-motive case and the after-acquired evidence case are not the same analytically. Even the Court in *McKennon* takes

126. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 886 (1995).

127. Brief for Petitioner at *47, *McKennon* (No. 93-1543).

128. Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403, 1406 (8th Cir. 1994)(emphasis added)(finding that the employer's single self-serving affidavit did not substantiate the "would not have hired" analysis).

129. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

note that a mixed-motive analysis is inapposite.[130] It is noted that under the Civil Rights Act of 1991, an employer in a mixed-motive case who meets the preponderance burden can deny an employee's remedies, including the denial of backpay.[131] Thus, today's employer may have a chance to escape the outlay of backpay when it has both a legitimate motive and illegitimate motive operating simultaneously.[132] Perhaps this makes sense in a mixed-motive case, because on the date of discharge there was a valid, non-discriminatory reason to terminate the plaintiff and so the backpay award would essentially be moot. However, in the after-acquired evidence context, there is only a discriminatory motive in operation during the backpay period until the employer is "fortunate" enough to discover a valid reason for the termination.

Second, the preponderance standard has been applied when society has minimal concern with the case, and the parties share equal risk, which is not the case in employment discrimination cases.[133] Further, the Court in *Price Waterhouse* implied that a higher standard of proof may be required when determining a plaintiff's remedies.[134] The Court in that case rejected authorities seeking a higher standard[135] stating that "each of these sources deals with the proper determination of *relief* rather than with the initial finding of *liability* . . . . Because we have held that . . . the employer [in *Price Waterhouse*] may avoid a finding of liability altogether and not simply avoid certain equitable relief, these authorities do not help . . . ."[136] Specifically, the Court noted that an earlier Supreme Court decision stated that there is a "clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount."[137]

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130. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 885 (1995)(stating that mixed motive cases are inapposite except to the extent they underscore the necessity of determining the employer's motives in ordering the discharge).

131. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (1991 & Supp. 1994). *See also* McGinley, *supra* note 67, at 187 (referring to various sections of the 1991 Civil Rights Act and noting that the employer in the mixed-motive case is not subject to back pay among other remedies); EEOC COMPL. MAN. (CCH) ¶ 2095 (Sept. 1992)(recognizing that the new Act makes clear that employers will not have to provide back pay in mixed-motive cases).

132. *See supra* note 131.

133. Zemelman, *supra* note 124, at 210.

134. *Id.*

135. The Court stated that an EEOC regulation, codified at 29 CFR § 1613.271(c)(2) (1988), does require "federal agencies proved to have violated Title VII to show by clear and convincing evidence that an individual employee is not entitled to relief." Price Waterhouse v. Hopkins, 490 U.S. 228, 253-54 (1989).

136. Price Waterhouse v. Hopkins, 490 U.S. 228, 254 (1989)(emphasis added).

137. Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989)(citing Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931)). *See* Zemelman,

Further, in *Nanty v. Barrows Co.*,[138] the court in a pretext case stated that at the relief stage, a heavier burden should be imposed on the employer. The court stated that where the job applicant proves unlawful discrimination, he must be awarded full relief, unless the employer proves by clear and convincing evidence otherwise.[139] Additionally, a concurring opinion in *Toney v. Block*,[140] stated that a clear and convincing standard furthers Title VII's deterrent purpose and discourages unlawful conduct by employers "[b]y making it more difficult for employers to defeat successful plaintiffs' claims to retroactive relief."[141] A substantial burden, rather than merely a preponderance standard, makes sense; otherwise, it would again be too simple for employers to engage in a quick post-hoc evaluation and have a personnel director years later state that the employee would have been terminated.

Thus, to safeguard the plaintiff's interest and the employer's desire to engage in post-hoc evaluations, the clear and convincing evidence standard seems to be the better approach to determine the plaintiff's remedies in the after-acquired evidence context. Therefore, the employer should be able to limit backpay to the date it would have found the hidden information only if it can show by clear and convincing evidence that it would have made the same decision to dismiss the plaintiff in the absence of discrimination.[142]

Therefore, backpay may be limited in certain circumstances, but only providing that the employer can show 1) that it would have terminated the employee for non-discriminatory reasons (such as a business closing) or 2) by clear and convincing evidence, that it would have discovered the misrepresentation or misconduct on its own accord *and* it would have terminated the employee under objective, pre-set company policies. This formula not only puts the onus upon employers to prove backpay limitations, it serves to make the plaintiffs in these cases whole without simply paying attorney's fees for services which would be irrelevant in the absence of discrimination.

b. Reinstatement

Reinstatement is a difficult issue. Although the employer came upon plaintiff's misrepresentation or misconduct via its own discrimi-

supra note 124, at 210 (noting the difference between the two Supreme Court decisions).

138. 660 F.2d 1327 (9th Cir. 1981).

139. *Id.* at 1333.

140. 705 F.2d 1364 (D.C. Cir. 1983).

141. *Id.* at 1373 (Tamm, J., concurring).

142. Although one commentator would also limit back pay at the "date of presumed discovery," McGinley, *supra* note 67, at 197, she does not draw a distinction between the discovery stage and the dismissal stage.

nation, it would be impossible to expect an employer to close its eyes to the information it learned. Additionally, one cannot overlook that reinstatement may be particularly invasive to an employer's right to terminate an employee at-will.[143] The Court in *McKennon* states that "[i]t would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds."[144] Although the Court recognized that factual permutations and equitable considerations may allow reinstatement, it concluded that as a general rule, reinstatement would not be appropriate.

Arguably, reinstatement of an employee who would never have been hired or who would have been fired goes beyond the make-whole provision of statutes such as Title VII and the ADEA. On the other hand, the Ninth Circuit noted the possibilities of such an equitable consideration. The Court stated that it would make no sense to allow an employer to refuse to reinstate an employee who had properly performed her job for twenty years just because a generation earlier she had exaggerated her education in order to work to support her family.[145] This is definitely different, continued the court, from the *Summers* example of a doctor practicing without a license wherein no hospital could *by law* be required to reinstate him.[146] In the latter case, it is obvious that the plaintiff would not legally be allowed reinstatement.

Although the Court was probably practical in its view that reinstatement will generally not be appropriate, perhaps the analysis should begin with the "factual permutations and equitable considerations." In this vein, two factors should measure the plausibility of reinstatement: 1) the relevancy of the misconduct or misrepresentation in relation to the job done by the plaintiff; and 2) whether the employee-employer relationship will be frustrated.

With regard to the first factor, it should be noted that relevancy should extend beyond mere reliance by the employer as the Sixth Circuit exemplified in *Johnson*.[147] Instead, the focus should concentrate on the relationship between the plaintiff's particular job duties and the misrepresentation or misconduct. With respect to the second factor, one commentator has suggested that in lieu of reinstatement, the court should award front pay as a surrogate since the denial of reinstatement came about only because of the employee's claim against

143. *See* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1240 (3d Cir. 1994).

144. McKennon v. Nashville Publishing Co., 115 S. Ct. 879, 886 (1995).

145. *See* E.E.O.C. v. Farmer Bros. Co., 31 F.3d 891, 901 (9th Cir. 1994).

146. *Id.* at 901-02.

147. *See supra* notes 19-20 and accompanying text. For a discussion relating materiality to the termination issue, see Parker, *supra* note 89, at 437-38.

the company.[148] Without any explanation, the Court in *McKennon* simply stated that front pay would not be appropriate. However, frontpay may be an appropriate solution when the practicalities of reinstating an otherwise eligible employee whom the employer now knows should be fired would frustrate the employer-employee relationship.[149] At the very least, frontpay should be considered with the facts and equities of each case. Where awarded, the award of front pay in this instance should be based on the backpay formula; that is, the employee should be paid up through the time the employer would have discovered, by clear and convincing evidence, the misrepresentation or misconduct, in the absence of the discrimination claim. In this respect, the employee is again made whole. Also, by focusing on this time period rather than the time of trial, the employee is not penalized by living in a non-litigious state where trials are resolved faster which would reduce the frontpay award. Of course, it should also be noted that under the anti-discrimination statutes, it is up to the court's discretion to award this relief. In cases where the employee-employer relationship would not be harmed and the materiality of misrepresentation or misconduct is but relatively nominal, reinstatement should remain an encouraged and plausible option despite the Court's general denial.[150]

c. *Injunctions and Declaratory Relief*

The *Wallace* court, denying reinstatement, stated that because the plaintiff would no longer be an employee, she would not be entitled to an injunction.[151] However, the court can use its discretion to effectuate the policies of such anti-discrimination statutes and should be able to do so despite the fact that reinstatement of the employee may not be appropriate. For example, section 706(g) of Title VII states that "the court may enjoin a respondent from engaging in an unlawful employ-

148. McGinley, *supra* note 67, at 197-98.

149. *See* Parker, *supra* note 89, at 440-41 (stating that "it would be acceptable to award front pay as an alternative to reinstatement on the basis of unworkability"). *Id.* at 441.

150. *See* EEOC COMPL. MAN. (CCH) ¶ 1225 (Oct. 1988)(stating that under section 706(g) of Title VII (codified at 42 U.S.C. § 2000e-5(g)(1) (1991 & Supp. 1994)), the court may order reinstatement, and under section 7(b) of the Age Discrimination in Employment Act (codified at 29 U.S.C. sec. 626(b) (1985 & Supp. 1994)), a court may order reinstatement or promotion).

Although the Civil Rights Act of 1991 would also deny reinstatement to a plaintiff whose employer in a mixed-motive case provided that it would have terminated plaintiff for nondiscriminatory reasons, after-acquired evidence cases are doctrinally distinct from mixed motive cases. *See supra* notes 130-37 and accompanying text. Thus reinstatement does and should remain a viable option for the after-acquired evidence victim.

151. Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1182 (11th Cir. 1992).

ment practice . . . ."[152] Other statutes also give the court this authority.[153] Additionally, since society has itself an interest in eradicating discrimination, it should be able to prevent employers from such practice, even though reinstatement of a particular plaintiff is not appropriate. The EEOC can voice society's concerns, for it also has an interest.[154]

2. *Legal Relief*

The Court does not include any specific discussion of legal relief in its *McKennon* opinion. However, the Court noted that under the controlling discrimination statute (the ADEA in *McKennon*), the court can grant such "legal or equitable relief as may be appropriate . . . ."[155] As explained below, legal relief should remain an appropriate remedy for the courts to employ.

a. Compensatory Damages

While after-acquired evidence may, in some circumstances, limit a plaintiff's equitable remedies, after-acquired evidence should not limit a plaintiff's damages.[156] Damages are incurred where harm has occurred. As noted in the section discussing employer liability, plaintiffs suffer real injuries in discrimination and harassment cases.[157] These injuries suffered by plaintiffs of discrimination and harassment were sustained due to the employer's actions. No matter what potential misrepresentation or misconduct an employer may find later during discovery, it cannot escape the fact that it has injured the plaintiff and must fulfill its obligations with respect to such injuries incurred. As petitioner in *McKennon* has noted:

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152. EEOC COMPL. MAN. (CCH) ¶ 1225 (Oct. 1988).

153. EEOC COMPL. MAN. (CCH) ¶ 1225 (Oct. 1988)(stating that "under [section 17] of the FLSA [Fair Labor Standards Act], the EEOC may seek an injunction . . . to restrain a respondent from violating any of the provisions of the EPA plus the payment of the back wages due, plus interest.").

154. *See* McGinley, *supra* note 67, at 196 n.340 (referencing E.E.O.C. Policy Guide, 405:6915, 6927 (July 7, 1992) which states that the "E.E.O.C. will seek injunctive and declaratory relief to prevent employers from discriminating similarly in the future").

155. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 886 (1995).

156. *See supra* notes 130-37 and accompanying text. The Civil Rights Act of 1991 would also deny damages to a plaintiff whose employer proved in a mixed-motive case that it would have terminated plaintiff for nondiscriminatory reasons. Because after-acquired evidence cases are doctrinally distinct from mixed motive cases, damages do and should remain a viable option for the after-acquired evidence victim.

157. With specific reference to harassment cases, Congress has stated that harassment could cause emotional pain, suffering, and anguish. Brief for Petitioner at *34, *McKennon* (No. 93-1543)(quoting 42 U.S.C. 1981a(b)(3)).

> [Emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and nonpecuniary losses are not] injuries that would have been sustained had respondent merely dismissed petitioner for the alleged misconduct, whether that dismissal had occurred at the time of the actual discharge . . . or when the after-acquired information was first invoked . . . . Respondent contends only that it would have discharged petitioner on the basis of that information; respondent does not assert that . . . it would have subjected petitioner to a protracted period of harassment before firing her. Thus the after-acquired evidence on which respondent relies does not affect the undeniable fact that only an award of damages can restore petitioner to the position she would have been in had the harassment not occurred.[158]

Further, in *Farmer Bros.*,[159] the Ninth Circuit held that "although after-acquired evidence of application fraud, if proven to be material, might limit the employee's right to reinstatement and to frontpay, such evidence does not relieve a defendant who has been found liable for employment discrimination from paying other forms of damages."[160] Such other damages may include compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."[161] Further, as is noted below, an employer will have its own recourse against the employee.

b. Liquidated and Punitive Damages

"Under Section 102 of the 1991 Civil Rights Act, a [plaintiff will be] entitled to punitive damages if he or she establishes that the employer engaged in discrimination 'with malice or with reckless indifference to the federally protected rights of an aggrieved individual.' "[162] Although punitive damages and other remedies will not be awarded in a mixed motive case where the employer proves that the employee was terminated for a non-discriminatory reason,[163] it has already been established that an after-acquired evidence situation is doctrinally distinct from the mixed-motive case. As the EEOC has stated, when the employer's *sole* motivation was discriminatory,[164] which is definitely the case in after-acquired evidence situations, and if it acted with

158. Brief for Petitioner at *34.

159. E.E.O.C. v. Farmer Bros. Co., 31 F.3d 891 (9th Cir. 1994).

160. *Id.* at 901.

161. Parker, *supra* note 89, at 425-26 & n.138 (recognizing such types of compensatory damages under the Civil Rights Act of 1991 (codified at 42 U.S.C. § 1981a(b)(3) (1991 & Supp. 1994)) and noting that the 1991 Act places limits on the amounts to plaintiffs).

162. EEOC COMPL. MAN. (CCH) ¶ 2095 (Sept. 1992). However, the Supreme Court, finding no congressional intent otherwise, has held that section 102 of the 1991 Civil Rights Act is not retroactive. Landgraf v. USI Film Prod., 114 S. Ct. 1483, 1508 (1994).

163. *See* EEOC COMPL. MAN. (CCH) ¶ 2095 (Sept. 1992).

164. *Id.*

"malice or with reckless indifference"[165] to the employee, then punitive damages may be awarded. The focus here is on the employer's acts. As the award of compensatory damages seeks to further the make-whole provision of Title VII, the award of punitive damages seeks to further the second purpose: namely, to deter discrimination in the workplace. Other statutes also provide for such punitive-type relief.[166] Again, no matter what skeletons the plaintiff has in his or her own employment closet, the fact remains that the employer has discriminated; if it has done so willfully or maliciously or with reckless indifference,[167] it should be assessed such penalties as are authorized under the appropriate statute.

c. *Employer's Recourse Lies Not in Its Fortuity of Finding a Tainted Plaintiff but Rather in Its Own Claims*

One may argue that plaintiffs with tainted pasts should not receive such a monetary benefit. However, the fact that after-acquired evidence comes to surface later should not limit a plaintiff's legal remedies; there are other ways to balance the scales. To explain, assume a terminated employee filed a Title VII action after he was discriminated against solely due to religious reasons. After discovery commences, the employer finds that the employee had stolen some equipment. Rather than deny plaintiff the right to have punitive and compensatory damages assessed against the employer, the more logical course of action would seem to be to allow the employer to seek his own damages in the form of a counterclaim and seek recompense against the plaintiff for his wrongdoing.[168]

Now suppose the same employee had not stolen equipment but rather had lied on his employment application. One may assert that the employer has suffered no "injury." This may or may not be true. The employer can, in this case, bring its own action for fraud against the plaintiff. As part of meeting its claim of damages, the employer

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165. *Id.*

166. *See* EEOC COMPL. MAN. (CCH) ¶ 1225 (Oct. 1988)(stating that pursuant to section 7(b) of the Age Discrimination Employment Act, the court may also assess, in cases of willful violations, liquidated damages in an amount equal to the back wages, plus interest; further, under section 16(b) of the Fair Labor Standards Act, an employee seeking relief under the Equal Pay Act may recover back wages from three years in the case of willful violations before the date that suit is filed, forward to the date of the court's decision, plus interest and potentially an equal amount in liquidated damages).

167. *See id.* (discussing that willful violations will invoke punitive damages under the Age in Discrimination Act and the Equal Pay Act); EEOC COMPL. MAN. (CCH) ¶ 2095 (Sept. 1992)(stating that malice or reckless indifference will invoke punitive damages under Title VII).

168. *See* Brief for Petitioner at *29, *McKennon* (No. 93-1543)(discussing redress by an employer and suggesting that even criminal or other forms of disciplinary proceedings might be appropriate).

will try to show how this misrepresentation injured its business. If the plaintiff, for example, was a salesperson who misrepresented that he had a college degree on his application, then the employer may very well have been injured by lower revenues due to the fact that the employee did not have the requisite training. For example, in *Fried v. AFTEC, Inc.*,[169] the court stated that although an employee is not usually liable to an employer for lost profits, if the employee materially misrepresented his background, training, and skills to apply for a job, the employer has an actionable claim.[170] Although this will be difficult for the employer to prove, it does not necessitate that the employer should have its outlay of damages reduced instead. Two reasons support this proposition.

First, if there was truly a justifiable injury to the company through the misrepresentation, the employer had two previous chances to cure it: 1) the employer could have checked plaintiff's application thoroughly either at the initial hire or when it noticed plaintiff was not up to the task; and 2) plaintiff could have terminated the employee when it noticed the poor record. Second, just as it may be difficult for the employer to prove it was injured through the misrepresentation, it must also be remembered that it may be difficult for the employee to prove that the employer was willful and deserved the imposition of punitive damages. Additionally, if there was no recognized injury to the employer, then it may be that the misrepresentation was not material and the employer does not warrant the windfall of damages.

IV. CONCLUSION

Discrimination has been infecting a number of employment settings. While the *Summers* reasoning only served to treat the symptoms of discrimination, the Court in *McKennon* has begun to treat the underlying problem by stating that after-acquired evidence should not be used at the liability stage. Not only is the after-acquired evidence doctrine theoretically and practically distinct from mixed-motive cases, it also plays no part in preventing a discrimination victim's injuries or fulfilling the interest of society and the goals of anti-discrimination statutes.

However, the Court's prescription to this end has not been made strong enough. Neither Rule 11 sanctions nor attorney's fees will stop employers from limiting their backpay liability, and as a result the plaintiff will not be made whole in his backpay award. The time period of when the employer would have by clear and convincing evi-

169. 587 A.2d 290 (N.J. Super. Ct. App. Div. 1991).

170. *Id.* at 298. Further, recognizing that an agent has a duty of loyalty to a principal, the agent may be subject to liability for loss caused to the principal. RESTATEMENT (SECOND) OF AGENCY § 401 cmt. a (1958).

dence discovered such after-acquired evidence under pre-set policies rather than when it actually discovered such evidence should better serve the make whole provisions of the anti-discrimination statutes. While after-acquired evidence may limit an employee's equitable remedies, however, the after-acquired evidence should never limit a plaintiff's compensatory or punitive damages. Harm has been done, and if harm has been inflicted by each side, then each side should pursue its own damages by presenting its case on the merits without the looming foreclosure of the doctrine of after-acquired evidence.

What will be the effects of such a proposal? Both employers and employees will face some changes and adapt to seek a balanced status quo. First, employers will likely be more careful in how they operate, and they should begin to enact policies and procedures to rid the workplace of discrimination. The employer will know that a summary judgment victory has, in essence, been foreclosed. It will know that to deny a plaintiff backpay or reinstatement, a high burden will have to be met. It will know that its economic resources will be tapped in awards of compensatory and possibly punitive damages. It will know that to survive, it will have to change. One side effect of such a change will be that employers, to meet their burden in denying reinstatement and limiting backpay, will enact tougher personnel policies to demonstrate that they take misrepresentation and misconduct seriously. An employer will check employee résumés and applications more carefully before offering employment in an effort to discover misrepresentations. It will periodically investigate the reports and conduct of employees who are already on the job to show it "would have discovered" any misconduct under its systematic procedures. The employer will likely be more careful in who it selects and who it retains.

Second, employees will also be affected. Employees will likely think twice before they lie on an application or commit on-the-job misconduct. The employee will know that employers are enacting stricter personnel policies in an effort to keep costs down. The employee will know that to lie or steal will likely reduce the chance for backpay or reinstatement. The employee will also know that while he may receive compensatory or even punitive damages, he will also be subject to any claims by the employer. The employee will be more likely to be careful of what he says and what he does both before he gets a job and afterward.

In the short run, we may see a slight increase in monies spent in defending these suits until the employer internalizes these costs by focusing on prevention. The responsibility, however, should be on the employer for it is the discrimination that begins these suits in the first place. However, once this responsibility is recognized and undertaken, both time and money spent in defending claims should be reduced; even summary judgment cases will be forgotten. In the long

run, the goal is that a more efficient and productive workforce will emerge—one where discrimination and harassment is reduced and employee integrity and honesty is enhanced.

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